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IN THE

Supreme Court of the United States

October Term, 1963.

No. 418

[redacted]

Respondent,

PENNSYLVANIA RAILROAD COMPANY,
Respondent,

v.

THOMPSON MAHOGANY COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

No.

OCTOBER TERM, 1963.

HARRY G. SEABOLDT,
Respondent,

v.

PENNSYLVANIA RAILROAD COMPANY,
Respondent,

v.

THOMPSON MAHOGANY COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of United States:

The petitioner, Thompson Mahogany Company, respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Third Circuit, entered on May 31, 1963, affirming

the judgment of the United States District Court for the Eastern District of Pennsylvania, and the appeals docketed in the said Court of Appeals as Nos. 13444, 13445, 13446 and 14269.

OPINION OF THE COURTS BELOW.

The opinion of the District Court (Ganey, then Chief Justice), is printed herein on page 13. The opinion of the Court of Appeals for the Third Circuit on the first appeal, is recorded in 290 F. 2d 296 (*infra*, p. 15). The opinion of the Court of Appeals for the Third Circuit on the appeal of Thompson Mahogany Company, petitioner herein, is printed herein at p. 25.

JURISDICTION.

The final judgment of the Court of Appeals was entered on May 31, 1963 (*infra*, p. 26). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED.

Is a railroad company, which is compelled to pay damages for injuries to one of its employees because of its sole negligence in failing to provide a safe gate across a side-track on an industry's property, entitled to recover indemnity from the industry under a side-track agreement, which provides for indemnity for any act or omission of the industry, and for equal contribution between the parties if the railroad's liability arises from their joint or concurring negligence?

STATEMENT OF THE CASE.

The plaintiff, a brakeman of the defendant railroad, sued the railroad under the Federal Employers Liability Act for injuries sustained while opening a defective cyclone fence gate which crossed the railroad's side-track leading into the Thompson Mahogany plant. The railroad joined Thompson Mahogany Company (the Industry) as a third party defendant, claiming both common law and contractual indemnity, or in the alternative, contribution, on the allegation that the Industry was both negligent and derelict in its contract obligation to maintain the gate in a safe condition. Plaintiff also filed a complaint against the Industry, based on negligence.

The case was tried twice. At the first trial, before Judge Ganey (then Chief Judge) the jury found the railroad negligent, absolved the Industry of negligence, and awarded the plaintiff damages of $35,000. The jury's verdict against the railroad was founded upon evidence that one of the strap hinges of the gate was not securely fastened to the post, with the result that when the gate was opened, it dropped and rested on the rails; that plaintiff was required to lift it in order to open it fully, and in doing so injured his back. There was evidence by railroad employees that this condition existed for some six months. The jury's verdict in favor of the Industry rested upon undisputed evidence that the railroad alone possessed a key to the gate; that although the side-track agreement required the Industry to maintain the side-track to the satisfaction of the railroad, the Industry's employees never observed the condition of the gate complained of, were never advised by the railroad of any defective condition, and were never informed by the railroad that the gate was not being maintained in a satisfactory condition.

The railroad appealed to the Third Circuit Court of Appeals from the judgments in favor of plaintiff against the railroad and in favor of the Industry. The Circuit Court, in an opinion by Judge Goodrich (290 F. 2d 296), granted a new trial to the railroad in the F. E. L. A. case, upheld the jury's verdict that the industry was not negligent, and held that the Industry was liable under the siding agreement to indemnify the railroad if the plaintiff should recover a verdict against the railroad at the new trial.

At the second trial, held before Judge John W. Lord, the plaintiff recovered a verdict against the railroad of $25,000. By direction of the Third Circuit Court of Appeals, the issue between the railroad and the Industry was not re-tried. The railroad paid the judgment, interest and costs, whereupon Judge Lord, following the mandate of the Circuit Court, entered judgment in favor of the railroad against the Industry in the full amount thereof. From the final judgment entered by Judge Lord, Petitioner, Thompson Mahogany Company, appealed to the United States Court of Appeals for the Third Circuit. The latter Court, on May 31, 1962, in a per curiam opinion, affirmed the judgment of the District Court.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

First Point.

The Decision of the Third Circuit Court of Appeals (based upon Judge Goodrich's Opinion on the first appeal —290 F. 2d 296) is in Conflict with Interpretations of Identical Side-Track Provisions made in Booth-Kelley Lumber Co. v. Southern Pacific Lumber Co., 183 F. 2d 902 (1950—9th Circuit); Chicago, Rock Island & Pacific R. R. Co. v. Dobry Flour Mills, Inc., 211 F. 2d 785 (1954—10th Circuit); Foster v. Penna. Railroad Co., 201 F. 2d 727 (1953—3rd Circuit); and Deutsch v. Pittsburgh, etc., Ry. Co., 7 District and County Reports 2d 505 (1956—Allegheny County, Penna., Common Pleas Court).

The third party action between the defendant Pennsylvania Railroad Company and your petitioner, third party defendant Thompson Mahogany Company, is a diversity action. As the side-track agreement between them was executed in Pennsylvania, both the common law and the contractual claims for indemnity are governed by the law of Pennsylvania.

The jury having absolved Thompson Mahogany of negligence, the trial judge at the first trial, Judge Ganey, entered judgment in favor of Thompson Mahogany on both counts for indemnity. The Third Circuit Court, however, by Judge Goodrich's opinion (290 F. 2d 296), while approving the judgment for common law indemnity based on the jury's verdict of no negligence on the part of Thompson Mahogany, reversed the District Court on the contractual indemnity count and ordered that if the plaintiff obtained a verdict against the Railroad on a new trial, the Railroad would be entitled to indemnity from Thompson for the latter's breach of the side-track agreement.

The agreement (printed herein at p. 27) contains a provision entitled "LIABILITY", which is numbered 8, and contains two paragraphs. For purposes of clarity in discussing its provisions, we quote the entire provision but divide the second paragraph into two paragraphs:

"LIABILITY.

"8. It is understood that the movement of railway locomotives involves some risk of fire, and the Industry assumes all responsibility for and agrees to indemnify the Railroad Company against loss or damage to property of the Industry or to property upon its premises, regardless of Railroad Company negligence, arising from fire caused by locomotives operated by the Railroad Company on said side track, or in its vicinity, for the purpose of serving said Industry, except to the premises of the Railroad Company and to rolling stock belonging to the Railroad Company or to others, and to shipments in the course of transportation.

"The Industry also agrees to indemnify and hold harmless the Railroad Company for loss, damage or injury from any act or omission of the Industry, its employees, or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said side track;

"and if any claim or liability, other than from fire, caused by locomotives as aforesaid shall arise from the joint or concurring negligence of both parties hereto it shall be borne by them equally."

Judge Goodrich held that since it was the duty of the Industry (Thompson Mahogany) to maintain the gate to the satisfaction of the Railroad; since a defective gate was not a "maintained" gate (though there was no evidence that the Railroad was dissatisfied—on the contrary the

Railroad contended the gate was in good condition); therefore Thompson Mahogany was guilty of an "omission" which rendered it liable to the railroad, regardless of negligence, under the second paragraph above quoted.

We submit that Judge Goodrich's decision conflicts with all the decisions of Federal Courts which have interpreted identical side track agreements:

In *Booth-Kelley Lumber Co. v. Southern Pacific Co.*, 183 F. 2d 902 (1950—9th Circuit), the Court said:

> "This is language which deals specifically with indemnity. We think that the parties must have intended that their obligations relating to indemnity should be defined by the paragraph which specifically refers to that subject. Deepvein Coal Co. v. Chicago and E. I. Ry Co., Seventh Cir., 71 F. 2d 963 (p. 906).
>
> "We think it was intended, and effectually stated in the contract that in a case of the kind described in Restatement Section 95 (*active and passive negligence*), Southern Pacific should have the right of full indemnity, while in a case of Section 102 kind (concurring primary negligence), Southern Pacific should have the right created by the contract to contribution to the extent of one-half the damages." (p. 910) (Emphasis ours.)

In *Chicago, Rock Island and Pacific R. R. Co. v. Dobry Flour Mills, Inc.*, 211 F. 2d 785 (1954—10th Cir.), the court said:

> "We construe the acts or omissions referred to in the indemnity clause of the contract to be the *wrongful or negligent* acts by Dobry which would create liability on the part of the railroad." (Emphasis ours.)

In *Foster v. Penna. Railroad Co.*, 201 F. 2d 727 (3rd Cir.—1953) the court said:

> "It is apparent that paragraph 8 of the siding agreement treats of three different situations. The

first deals with fire caused by locomotives and attempts to relieve the railroad from loss caused by its own negligence. The second deals with a primary-secondary, active-passive kind of negligence and provides for indemnity for the railroad from loss caused by the *primary negligence* of Crown Can, for which the railroad was also liable *but only secondarily so*, because of some legal relation to the injured party, as here, that of employer-employe. The third covers the situation of concurring primary negligence and provides contribution . . . .

"Having entered into a contract on the matter, the rights of the parties are to be determined thereby, rather than by common law rules of indemnity and contribution." (Emphasis ours.)

In *Deutsch v. Pittsburgh etc. Ry. Co.*, 7 District and County Reports 505 2d (Common Pleas Court of Allegheny County, Penna.—1956), the Court's interpretation of the same side track agreement was that adopted in the *Booth-Kelley Lumber Co., Chicago, Rock Island and Pacific R. R. Co.*; and *Foster* cases, *supra*. Based upon the Court's finding that both the railroad and the industry were guilty of primary, concurring negligence which contributed to the injury, both were required to contribute equally to damages for the injury caused when the injured person fell on a frozen and slippery surface adjacent to the siding as he was about to board a freight car.

Judge Goodrich, in his opinion on the first appeal, did not overrule the interpretation placed on this indemnity provision by the cases above cited. Rather he dismissed those decisions with a footnote to his opinion, stating that: "In these cases there was conduct on the part of the industry that could be construed as negligence, so that language to the effect that 'negligent' conduct by the industry is required to invoke the indemnity provisions is dicta." Thus he held that under the terms of this "Liability" pro-

vision, where the railroad and the industry are equally negligent they must share the liability equally, yet where the railroad *alone* is at fault, as established by the jury's verdict, the industry must shoulder the entire loss. In support of this interpretation, which we contend the parties could never have intended, Judge Goodrich cites the case of *Penna. R. R. Co. v. Erie Avenue Warehouse Co.*, 302 F. 2d 843 (3rd Cir.—1962). In that case, however, the trial court, sitting without a jury, awarded full indemnity to the railroad on the basis of a specific clause in paragraph 7 of the siding agreement, wholly aside from "a similar but more general provision in paragraph 9," which required the railroad to "maintain on its property a clear and safe space above and on each side of the track sufficient to insure the safety of employes and equipment of the Railroad Company [and to] indemnify and save harmless the railroad company from loss, damage and expense for failure so to do." The Third Circuit held that the railroad's acquiescence in the inadequate clearance which caused the accident amounted to primary, concurring negligence on the railroad's part which deprived it of the right to indemnity, and that under the last clause of the "Liability" provision, the railroad and industry should share the liability equally. Thus the Third Circuit in the *Erie Avenue* case, far from holding that the standard "Liability" provision we are considering provides for indemnity regardless of the indemnitor's fault, once again held, in line with the decisions above cited, that the indemnity clause is to be invoked where the indemnitor is the active wrongdoer, and the indemnitee is liable merely for failure to make safe the dangerous condition created by the indemnitor. The side track agreement in the *Erie Avenue Warehouse* case contained two entirely separate indemnity clauses, which the Circuit Court did not attempt to reconcile. Rather, Judge Hastie said: "We need not decide whether these two provisions are partially overlapping. It is sufficient for present purposes

that they seem to provide full indemnity to the railroad for harm it may suffer as a result of unsafe conditions, and particularly close clearances, that Erie shall have permitted to exist on its property."

We submit that the judgment of the Third Circuit Court of Appeals in the instant case is in conflict with the plain meaning of the contract in question and with the decisions rendered by the Courts of Appeal of the 9th Circuit, the 10th Circuit, and this 3rd Circuit, and the only case on the subject decided by a Pennsylvania court, and that it should accordingly be reversed.

Second Point.

The Issue Involved Therein is of Paramount Importance to a Uniform Understanding of the Meaning of Similar Agreements between Railroads and Industries.

The standard liability clause found in this agreement is used extensively in dealings between railroads and industries they serve throughout the country, as indicated by the cases cited. While it is no doubt possible to re-write such contracts to relieve an industry of liability for either indemnity or contribution if it is found by a jury to be without fault, there are doubtless many such cases now awaiting trial or pending appeal. Contrary to logic and justice, the industry in such cases will profit by conceding its negligence where no negligence exists, and the railroad will, in like manner, profit by withholding evidence of the industry's negligence.

CONCLUSION.

The decision in the instant case is a major departure from the rulings made by the several United States Courts of Appeal both before and since, and if allowed to stand will create further disharmony in the hitherto uniform interpretation of the contract in question and will result in the conscious distortion of facts in the trial of similar

cases in order to obtain a financial advantage. For the reasons assigned above, it is respectfully submitted that the judgment of the United States Court of Appeals for the Third Circuit should be set aside.

Respectfully submitted,

FRANCIS E. MARSHALL,
LYNN L. DETWEILER,
SWARTZ, CAMPBELL & HENRY,
Counsel for Petitioner.

APPENDIX TO PETITION.

JUDGMENT OF THE U. S. DISTRICT COURT.

(Filed April 15, 1959)

Before GANEY, *Ch. J.*

AND NOW, to wit:, April 15, 1959, in accordance with the verdict it is ORDERED that judgment be and is hereby entered in favor of plaintiff Harry G. Seaboldt and against the defendant Pennsylvania Railroad Company, in the sum of Thirty-five Thousand and 00/100 ($35,000.00) Dollars, together with costs, and it is

FURTHER ORDERED that Judgment is hereby entered in favor of Defendant Thompson Mahogany Co., and against the Plaintiff, Harry G. Seaboldt, with costs, and it is

FURTHER ORDERED that Judgment is hereby entered in favor of Third-Party Defendant, Thompson Mahogany Co., and against Third-Party Plaintiff, Pennsylvania Railroad Company, with costs.

By THE COURT:

Attest:

(s) R. J. GREENWOOD,
Deputy Clerk.

ORDER OF THE U. S. DISTRICT COURT.

(Filed September 30, 1960)

And Now, to wit, this 30 day of September, 1960 in accordance with the opinion and findings filed September 15, 1960, judgment is entered in favor of Third-Party Defendant and Third-Party Plaintiff, the Pennsylvania Railroad Company, on the cause of action alleged by Third-Party Plaintiff based upon the siding agreements.

GANEY, *C. J.*

OPINION OF U. S. C. A. 3.

(Filed May 8, 1961)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 13,444, 13,445 and 13,446

HARRY G. SEABOLDT

v.

THE PENNSYLVANIA RAILROAD COMPANY,
(Deft: and 3d-party pltf.),

Appellant

v.

THOMPSON MAHOGANY COMPANY
(3d-party deft.)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued April 6, 1961

Before GOODRICH, MCLAUGHLIN and HASTIE, *Circuit Judges*.

OPINION OF THE COURT

(Filed May 8, 1961)

By GOODRICH, *Circuit Judge*.

This is an appeal from a judgment against the Pennsylvania Railroad for personal injuries suffered by Harry G. Seaboldt, the plaintiff, and against the Railroad in its action against Thompson Mahogany Company (Thompson), third-party defendant.

The plaintiff alleged injury from a back strain suffered when he was endeavoring to open a gate which led into Thompson's premises. The Railroad had a siding into Thompson's yard. This siding was protected by a gate which was kept locked. When railroad cars were taken to or from the siding it was, of course, necessary to unlock the gate and close it again after the operation was completed. The Railroad claims that Thompson is responsible for any damages the plaintiff recovers because of an indemnity agreement between Thompson and the Railroad.

The provisions of this contract on which the Railroad's claim is made are two. First that Thompson promised to maintain the sidetrack and all appurtenances.[1] Also that Thompson promised "to indemnify and hold harmless the Railroad company for loss, damage or injury from any act or omission of the Industry . . ."

What is the obligation of Thompson under this contract? In this case the jury found for the plaintiff against the Railroad under the F. E. L. A. It also found that Thompson was not negligent toward the plaintiff and was not liable to the Railroad under any common-law theory.[2] Is Thompson liable under this contract to indemnify the Railroad even if the jury has found that the Railroad was itself negligent?

Counsel cite a great many decisions in the discussion of this indemnity question. The meaning of words in a

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1 In its brief Thompson concedes that a proper reading of the construction and maintenance provisions of the contract requires the industry to maintain the appurtenances as well as the track itself although the maintenance provision alone does not make that clear.

2 The trial judge decided the contractual indemnity theory himself. See text *infra*. We do not think that there should have been any issue of common-law indemnity in the case, since we construe the contract to have established the sole basis for indemnity.

We do accept the jury's finding that Thompson was not negligent for there were no errors in the trial which affect that finding. That issue need not be tried again. This is similarly true of the case of the plaintiff against Thompson.

contract is nearly always the subject of much argument. Sometimes a word or two will produce a series of consequences. For instance, when a man indorses a negotiable instrument in blank the indorser assumes many liabilities and the indorsee acquires many rights. A simple signature does it. Sometimes, too, the attainment of a given result depends upon the exact form of words used. A typical example is the necessity of the word "heirs" to create a fee simple at common law. In other instances, usage of a particular trade may describe in shorthand what people in the trade mean by a given word or phrase. Who would know the difference between "prime" and "choice" beef unless he had been instructed by an expert in the trade. When a word or a phrase has been made the subject of a series of rulings by a court in a given state, we may then conclude that the use of those words accomplishes the result which the line of decisions indicate. So, if we had a series of cases dealing with a contract like the one before us and the court had ruled that under those terms the promisor was or was not liable for certain results, we could take that series of rulings as the law governing the effect of those words. We have no such situation here.[3]

3 It is true that the same or similar words as used in this siding agreement have been presented to the courts before. See Baltimore and Ohio R. Co. v. Alpha Portland Cement Co., 218 F.2d 207 (3d Cir. 1955); Foster v. Pennsylvania R. Co., 201 F.2d 727 (3d Cir. 1953); Minneapolis-Moline Co. v. Chicago, M. St. P. & P. R. Co., 199 F.2d 725 (8th Cir. 1952); Booth-Kelly Lumber Co. v. Southern Pacific Co., 183 F.2d 902 (9th Cir. 1950). In these cases there was conduct on the part of the industry that could be construed as negligence, so that language to the effect that "negligent" conduct by the industry is required to invoke the indemnity provisions is dicta. *Cf.* Chicago, R.I. & P. R. Co. v. Bobry Flour Mills, 211 F.2d 785 (10th Cir.), *cert. denied*, 348 U.S. 832 (1954); Cacey v. Virginia R. Co., 85 F.2d 976 (4th Cir. 1936), *cert. denied*, 300 U.S. 657 (1937); Pennsylvania R. Co. v. Erie Avenue Warehouse Co., F. Supp. (E.D. Pa. 1960).

None of the cases construing language like that before us has faced the issue presented to us, and we approach the language for our purposes as though it had not been construed before.

and, therefore, determine for ourselves the effect of the words used by the contracting parties.

It is to be pointed out that we are not now dealing with passive or active negligence nor any question of indemnity or contribution between tortfeasors.[4] This is solely a question of contractual liability assumed by Thompson when Thompson and the Railroad made their contract at the time of the installation of this siding.

Since, as indicated later in this opinion, the question of the Railroad's liability must go back for a new trial, the contract is construed on the basis of the legal rights of the parties should a jury again find the Railroad liable. We express no opinion concerning the outcome of the new trial.

We think the contract is broad enough to make Thompson liable for the consequences of this accident if the jury should find the Railroad liable. We rely upon the language which Thompson agreed to in entering into this contract. It promised to maintain the siding. It also promised to hold the Railroad harmless for damage from any act or omission. If this gate was in a state of disrepair, that disrepair is certainly due to an omission on Thompson's part to "maintain" all the appurtenances. We think this is the agreement Thompson made. It does not rest upon any tort liability of either party but simply, as a matter of contract, creates the obligation on Thompson as above indicated.

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4 Other cases have discussed active and passive negligence or something similar in dealing with provisions like that before us but also providing for contribution. See, *e.g.*, Baltimore and Ohio R. Co. v. Alpha Portland Cement Co., 218 F.2d 207 (3d Cir. 1955). We are not faced with that problem here. The agreement provides: "and if any claim or liability, other than from fire, *caused by locomotives* as aforesaid [operated on the siding to serve the Industry] shall arise from the joint or concurring negligence of both parties hereto it shall be borne by them equally." (Emphasis added.) Injury caused by lifting a gate is certainly not caused "by locomotives," so the contribution provision is inapplicable.

The effect of the words in the contract is not a matter for jury interpretation and the trial judge correctly assumed responsibility for deciding this part of the case. He followed the right procedure although we disagree with his conclusion. Thompson is liable under the contract to indemnify the Railroad, if indeed, the plaintiff recovers at the new trial.

New Trial in F. E. L. A. Action.

At the pretrial stage of this case District Judge Clary directed the lawyers for the respective parties herein "to immediately exchange all medical information and photographs . . ."

Toward the end of the trial it developed that the plaintiff sometime prior to his accident had consulted professionally a chiropractor named Walter.[5] The point about the plaintiff's knowledge of this chiropractor is well and tersely stated by District Judge Ganey who tried the case. He said in his opinion:

> "The plaintiff's counsel had previously advised defendant's counsel that he did not know the name nor the whereabouts of this chiropractor at the time of trial and previous thereto. However, as was shown at a later hearing, it was plain that the plaintiff's counsel did know the name and whereabouts of Dr. Walter, the chiropractor who treated the plaintiff."

After the evidence from both sides had been received the Railroad requested the judge to reopen the case and hear the testimony of this chiropractor. This was done. Then followed the verdict for the plaintiff. Railroad's

5. In a pretrial deposition the plaintiff disclosed that he had been examined by a chiropractor and the general neighborhood in which the chiropractor was located. During the early part of the trial mention was made of this examination, but the identity of the chiropractor did not appear in the record until the third of four days of actual trial. The chiropractor did not appear until the final day after all the parties had rested.

lawyer asked the judge for a hearing to determine whether the statement of lack of knowledge on the part of the plaintiff's law firm was true. After a hearing the trial judge made a finding which we quote verbatim.

> "And Now, this twenty-first day of December, 1959, the Court makes the finding that the first date that Mr. Richter's law office, Richter, Lord & Levy, in the City of Philadelphia knew of Dr. Walter's identity was April 9, 1959, and this date is herewith made a Finding of Fact in the defendant's motion to determine when the above-mentioned office first learned of Dr. Walter's identity.
>
> /s/ J. CULLEN GANEY,
> Ch. J."

Plaintiff's counsel attacks this finding because, he says, it is not supported by the evidence and is, therefore, clearly erroneous. The best way to determine the soundness of that argument, we thought, was an examination of the testimony both at the trial and at the post-trial hearing. This we have done.[6] The chiropractor was not the best witness in the world but the judge heard him patiently and upon examination of all the testimony which bears on this point we are certainly not willing to say that he came to a conclusion which was clearly erroneous. We, therefore, take his finding of fact.

Now what should the consequence of this failure to disclose in obedience to the prior order be? Plaintiff's counsel says it made no difference. The Railroad's lawyer, had he been duly diligent, it is argued, could have found out all about this chiropractor for himself. Furthermore, if there was anything wrong the Railroad should have

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6 At argument plaintiff's counsel indicated that there was material included in the record before this Court which was expressly excluded in the lower court and which was not properly before us. We feel no need to do more than indicate that we have not considered the material at all.

moved for the withdrawal of a juror or moved to have the case reopened and the witnesses examined again. We think this gratuitous advice is not very helpful. It is true that we cannot say for a certainty that previous knowledge of this chiropractor's identity and what he was going to say would have changed the case from a verdict for the plaintiff to one for the defendant or have changed the amount of the verdict. But it would have made a difference in Railroad counsel's approach to the testimony of several witnesses. Among these would have been the testimony of the plaintiff himself and that of his wife. The plaintiff's case on the subject of damages was that he suffered this severe injury to his back as a result of the accident which, in turn, was the fault of the Railroad. The chiropractor gave testimony that he had treated the plaintiff previously for a "chronic" back ailment. Cross-examination of both the plaintiff and his wife could have gone much further than it did into this question.

There was also the question of the evidence of Dr. Scott, a neuro-surgeon who appeared as a witness for the plaintiff. No one questions either the professional standing or the complete integrity of this eminent surgeon. But had Railroad's counsel been in the possession of what the chiropractor had to say, it could well be that questions put to the surgeon based on what the chiropractor had said could have had some effect upon Dr. Scott's approach to the medical problem.

As said before, it cannot be stated with certainty that all of this would have changed the result of the case. But, as said by the Supreme Court, a litigant who has engaged in misconduct is not entitled to "the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." *Minneapolis, St. Paul & S. S. Marie Ry. Co. v. Moquin*, 283 U. S. 520, 521-2 (1931).

There is another point with regard to the conduct of the trial which comes very close to being grounds for a

new trial even though we are not compelled to say that it is alone sufficient. The able and experienced trial judge gave an excellent charge to the jury. He discussed the case from all angles and presented it in such a way that the members of the jury, if they listened as they were bound to, would have a full understanding of what their problems were. At the end of the charge counsel, as they frequently do, began to offer objections. It is quite understood, of course, that if objections to the charge are to be preserved the objections must be stated then and there and the reasons therefor. Fed. R. Civ. P. 51, 28 U. S. C. One only has to look at trial records, however, to see how many of such objections are not only futile but result in confusion of the jury.

In this case Mr. Richter took exception to that portion of the court's charge on contributory negligence. He claimed what the judge had told the jury was a charge on assumption of risk "which is no defense under the statute." The objection was not well taken. The charge on contributory negligence was clear and accurate. But under pressure of objection the court said to the jury "I want to say to you that this plaintiff does not assume any risk of his employment. The doctrine of assumption of risk has been abolished. There is no assumption of risk in his employment." Railroad's counsel did not raise his voice at that moment. It should be remembered that all this took place immediately after the charge, and, no doubt, Railroad's counsel, who was next, was busy getting ready for what he had to say. At any rate, the record went on for several pages and when the jury was about ready to go out one juror said: "Your Honor, when you referred to assumption of risk, what did you mean?" Then the court gave another paragraph of instruction. Mr. Richter, at this point, undertook to instruct the jury himself and to improve upon the judge's language. He said, "In other words, he does not assume any risk nor assume that anybody else is going to be negligent to him." Then the court

added two more lines. Plaintiff's counsel then pressed the judge to tell the jury there was a special act of Congress to protect railroaders under this statute. By that time Railroad's counsel raised an objection. The court did not stop to hear more but immediately had the bailiff sworn and sent the jury out.

It was unfortunate to bring in this business of assumption of risk at this stage of the case. No one had mentioned it either in pleadings, argument, testimony or written documents. No one would have thought of it. Plaintiff's counsel's objection to the judge's charge is not well taken. The line between contributory negligence and assumption of risk is a difficult one to draw. This Court has recently had occasion to discuss it and to point out that fact. *Potter v. Brittan*, 286 F. 2d 521 (1961).

It seems very clear in reading this record afterward that for this difficult concept to be thrown to the jury's mind at the last minute without much explanation was almost sure to have left it in confusion. The case had been hard fought. The charge of the judge had presented the problems clearly and this new matter coming in at the end was enough to confuse the most conscientious jury. In view of the fact that we are already ordering a new trial we do not need to decide whether the Railroad's objection was timely taken or sufficiently taken. Nor do we need to decide whether the matter is so fundamental that the point can be taken up without timely objection. *Cf. McNello v. John B. Kelly, Inc.*, 283 F. 2d 96 (3d Cir. 1960). In view of what we have said it is unlikely that the question will come up in a second trial of the case.

The judgment of the district court will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

ORDER AND JUDGMENT OF THE U. S. DISTRICT COURT.

(Filed October 26, 1962.)

Before JOHN W. LORD, JR., *J.*

AND NOW, to wit this 26th day of October 1962, it appearing that neither Plaintiff nor Defendant desires to pursue the post-trial motions filed in the FELA action between Plaintiff and Defendant said motions are denied.

FURTHERMORE, after a hearing and upon consideration of the attached stipulation and the Judgment heretofore entered on December 8, 1961, it is

ORDERED that judgment is entered in favor of the Third-Party Plaintiff, The Pennsylvania Railroad Company, and against the Third-Party Defendant, Thompson Mahogany Company, in the amount of $33,714.30.

By THE COURT,

JOHN W. LORD, *J.*

OPINION OF U. S. C. A. 3.

(Filed May 31, 1963.)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,269

HARRY G. SEABOLT

v.

PENNSYLVANIA RAILROAD COMPANY

v.

THOMPSON MAHOGANY COMPANY,
THIRD PARTY DEFENDANT,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued May 23, 1963

Before KALODNER, STALEY and SMITH, *Circuit Judges*

OPINION OF THE COURT.

(Filed May 31, 1963)

PER CURIAM

On review of the record we find no error. The District Court's Order and Judgment dated October 26, 1962 will be affirmed.

JUDGMENT OF U. S. C. A. 3.

(Filed May 31, 1963.)

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment filed October 26, 1962 of the said District Court in this case be, and the same is hereby affirmed, with costs.

SIDE-TRACK AGREEMENT.

THE PENNSYLVANIA RAILROAD

AGREEMENT FOR INDUSTRY TRACK

COPY

THIS AGREEMENT, made this 17th day of November 1949 between The Pennsylvania Railroad Company, operating the Railroad of The Philadelphia and Trenton Railroad Company, as Lessee, hereinafter called the Railroad Company, and Thompson Mahogany Company, a Corporation organized and existing under the laws of the State of Delaware, hereinafter called the Industry:

WITNESSETH,

WHEREAS, the Industry desires track facilities, hereinafter called side track, for the economical and convenient conduct of the business of the Industry, at or near Edmund and Bleigh Streets station, County of Philadelphia, State of Pennsylvania, described as follows:

A side track connected with the track of the Railroad Company at a point 2391 feet west of center line Holmesburg Junction Passenger Station in accordance with plan numbered x-918-B dated 9-27-49 designated as "Exhibit A" hereto attached and made a part hereof;

NOW, THEREFORE, in consideration of the covenants and agreements herein contained, it is mutually agreed that the said side track shall be constructed and maintained, and the Railroad Company hereby agrees to operate the same under the following terms and conditions:

RIGHT-OF-WAY:

1. The Industry shall provide, without cost to the Railroad Company, all necessary land or property outside

of the right of way of the Railroad Company, required for the proper construction and operation of said side track; said amount of land or property to be satisfactory to the Railroad Company.

The cost and expense of procuring or complying with any ordinance, order, permit or consent whatsoever required by Municipal, State or other lawfully constituted authorities for the construction, maintenance, operation and use of said side track shall be borne by the Industry.

The Railroad Company shall have the right to enter upon the property of the Industry for the purpose of constructing, maintaining and operating said side track.

CONSTRUCTION.

2. The cost of constructing said side track, including roadbed, ties, bridges, and all other appurtenances in connection therewith, shall be borne as follows:

This agreement covers a side track already constructed and existing and supersedes agreement between The Pennsylvania Railroad Company, and Millard Construction Company, dated June 8, 1908 and agreement between The Pennsylvania Railroad Company and Keystone State Construction Company, dated July 5, 1921 covering construction, ownership, maintenance and use of said side track.

If the Railroad Company performs any construction or repair work on account of and at the expense of the Industry, the latter agrees to assume and pay:

The cost of the work, plus the usual percentages added for overhead. This cost includes the charges for use of work trains and hand and machine tools, as well as all labor, material and appliances. There shall also be added the cost of insurance protecting the Railroad Company from loss or damage for which it may be legally liable by reason of injury to persons or damage to property; provided, if the locomotive of the work train causes damage by fire to any property mentioned in the first paragraph of Article 8 hereof, such loss or damage shall be borne by the parties hereto as provided in said paragraph of Article 8.

MAINTENANCE.

3. Said side track shall be maintained (including removal of ice and snow) and renewed to the satisfaction of the Railroad Company; the work shall be performed and the cost thereof borne as follows: That portion of the side track (between points A and B), and shown by yellow lines on the plan, shall be maintained and renewed by, and at the expense of, the Railroad Company.

That portion of the side track (between points B, C and D), and shown by brown lines on the plan, shall be maintained and renewed by, and at the expense of, the Industry.

OWNERSHIP.

4. The title and ownership of said side track shall be vested as follows: That portion of the side track (between points A and B), and shown by yellow lines on the plan, shall be owned by the Railroad Company.

That portion of the side track (between points B, C and D), and shown by brown lines on the plan shall be owned by the Industry.

USE.

5. The Railroad Company shall have the right to use the whole or any part of said side track, provided such use shall not unreasonably interfere with the use thereof by the Industry.

Neither party hereto shall permit or authorize the use of said side track by or for the benefit of any other person, firm or corporation not one of the parties hereto without the written consent of the other party. The Industry shall not assign this contract or any rights thereunder, without the written consent of the Railroad Company. The Railroad Company retains its own right to construct and use additional switch connection with that portion of the side track owned by itself when additional side tracks outside the provisions of this agreement may be necessary in the conduct of its business.

CHANGES OR ENLARGEMENTS.

6. If any change, rearrangement, extension or enlargement of said side track or its structures shall at any time be necessary by reason of any change in the Railroad Company's track or tracks, or because of any change in the operating practice of the Railroad, the Railroad Company shall not be required to bear any expense resulting therefrom except with respect to the portion of the side track owned by it.

CLEARANCES.

7. The Industry agrees not to permit any obstructions over said side track, less than clearance regulations above top of rail, or alongside of said side track less than clearance regulations from center of track, with the necessary additional clearance on curves.

The Industry will observe and comply with all rules and regulations of the Railroad Company governing the handling of inflammable liquids, including loading and unloading tank cars, the location of racks and storage tanks, and protection of oil sidings from danger due to stray electric currents.

LIABILITY.

8. It is understood that the movement of railway locomotives involves some risk of fire, and the Industry assumes all responsibility for and agrees to indemnify the Railroad Company against loss or damage to property of the Industry or to property upon its premises, regardless of Railroad Company negligence, arising from fire caused by locomotives operated by the Railroad Company on said side track, or in its vicinity, for the purpose of serving said Industry, except to the premises of the Railroad Company and to rolling stock belonging to the Railroad Company or to others, and to shipments in the course of transportation.

The Industry also agrees to indemnify and hold harmless the Railroad Company for loss, damage or injury from

any act or omission of the Industry, its employees, or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said side track; and if any claim or liability, other than from fire, caused by locomotives as aforesaid shall arise from the joint or concurring negligence of both parties hereto it shall be borne by them equally.

DISCONTINUANCE.

9. Any and all loss or damage sustained by the Industry in consequence of any temporary or permanent elimination of said side track, shall be assumed by the Industry, or in event the disposition of the property of the Railroad Company, or its future use or development shall make it impracticable in the judgment of the Railroad Company to continue the connection, the Industry hereby waives any and all claims therefor.

CANCELLATION, TERMINATION AND REMOVAL.

10. This agreement shall be terminable upon ninety (90) days' written notice from either party to the other.

Upon termination of this agreement the Railroad Company shall have the right to enter upon the property of the Industry and remove any or all of the material owned by the Railroad Company, and shall not be liable to account in any way to any one for any monies paid or expended on account of any of the track or tracks covered by this agreement, nor for any damages resulting from the removal of any or all of the material owned by the Railroad Company.

Likewise, the track material contained in that portion of the side track on railroad right-of-way, between the clearance-point and right-of-way line, which was paid for by the Industry, shall become the property of and be returned to the Industry, the latter bearing cost of salvaging. If the material be not reclaimed by the Industry within sixty (60) days after receipt of written notice, the material shall become the property of the Railroad Company.

Until terminated as hereinbefore provided, this agreement shall inure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in Duplicate the day and year first above written.

THE PENNSYLVANIA RAILROAD COMPANY,
LESSEE,

By /s/ H. D. KRUGGEL,
Superintendent, Phila. Terminal Division,

THOMPSON MAHOGANY COMPANY;
INDUSTRY,

By /s/ C. H. THOMPSON, 3RD,
V-President.

WITNESS: (For Railroad Company)

/s/ W. S. THOMPSON.

ATTEST: (For Industry)

/s/ S. WARD HUGHES,
Secretary.

(Seal)

Note:—

EXECUTION BY INDUSTRY:—In case the Industry is an individual, have such individual sign his name in full and affix thereto his seal; if the Industry is a corporation, insert the full name of the corporation and have agreement signed by the President, attested by its Secretary, and its corporate seal affixed.

Issued

March 11, 1949.